

STATE OF MICHIGAN
COURT OF APPEALS

KAY BUILDING & LAND DEVELOPMENT,
L.L.C. and SHAMEL T. RUSHWIN,

UNPUBLISHED
June 3, 2004

Plaintiffs-Appellants,

V

No. 244638
Oakland Circuit Court
LC No. 01-031188-CK

MICHAEL J. DUL & ASSOCIATES, INC and
NU-WAY SUPPLY CO, INC,

Defendants

and

C.R. HEATER, INC,

Defendant-Appellee.

Before: Markey, P.J., and Wilder and Meter, JJ.

MEMORANDUM.

Plaintiffs appeal as of right the order of dismissal entered after the court granted summary disposition to C.R. Heater, Inc (defendant). We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Kay Building & Land Development L.L.C. was the builder of a home for Shamel Rushwin. Michael J. Dul & Associates, Inc was the landscape architect on the project, and it suggested that plaintiffs incorporate a snow-melting system into the driveway. Nu-Way Supply Co, Inc. designed and provided the system, and plaintiffs contracted with defendant to install the system.

In this appeal, plaintiffs assert that the court erred in granting summary disposition to defendant on their breach of contract and defective design claims. A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating the motion, the trial court considers affidavits, pleadings, depositions, admissions and other evidence submitted by the parties in a light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue of material fact, the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

Plaintiffs claimed that defendant breached the contract by not properly installing the system. The evidence they presented in support of this claim was that the system never worked properly and it leaked. In support of the defective design claim, they presented deposition testimony that defendant altered the design in an improper manner. However, none of the evidence presented shows that the actions of defendant rendered the system defective. Defendant presented evidence that the system passed a pressure test, and did not leak when it was installed. The assertion that because the system leaked the installation was defective is based on speculation that is not supported by evidence, as required by *Maiden, supra*. Similarly, there is no evidence that defendant was responsible for the faulty design of the system. The trial court properly granted summary disposition to defendant.

Affirmed.

/s/ Jane E. Markey
/s/ Kurtis T. Wilder
/s/ Patrick M. Meter